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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Docket No. R97-1

Postal Rate And Fee Changes, 1997

**MOTION OF ALLIANCE OF NONPROFIT MAILERS
TO COMPEL ANSWERS TO INTERROGATORIES OR
STRIKE TESTIMONY
(ANM/USPS1 1-16)
(November 14, 1997)**

The Alliance of Nonprofit Mailers ("ANM") hereby moves to compel the Postal Service to answer sixteen interrogatories, ANM/USPS-1 through 16, filed and served by ANM on November 3, 1997 or to strike all testimony the includes, involves, or relies upon the materials its interrogatories inquire about. The Postal Service's objections to these interrogatories reflect a continued attempt to shift the burden of documenting and verifying the its rate request from the Postal Service to interveners and the Commission. Fundamental norms of administrative due process, the Commission's long-established rules for documentation and discovery of rate cases, and Commission Orders 1200 and 1201 all dictate that the Postal Service answer the questions.

RESPONSES TO GENERIC OBJECTIONS

The interrogatories involve the 50-odd library references which the Postal Service has belatedly sought to sponsor into evidence in this case. As the Postal

Service obliquely acknowledges in its Objections (at 1 n. 2), the discovery requests are largely taken verbatim from Rules 31(k) and 54(o) of the Commission's Rules of Practice, 39 C.F.R. §3001.31(k) and §3001.54(o). Those rules establish threshold requirements for information that the Postal Service must include *in its case-in-chief*. If the Postal Service had properly sponsored these library references as part of its rate request in July, the ANM and other parties would have been entitled, then and there, to the specified information relating to the studies and data set forth in those library requests *without filing any discovery requests at all*. The Postal Service has not, does not, and cannot explain why its belated sponsorship of these library references should excuse it from supplying the information now.

(1) The Postal Service's "general" objection to the interrogatories as a "fishing expedition" (Objections at 2) is disposed of by *Hickman v. Taylor*, 329 U.S. 495 (1947), which ushered in the modern era of discovery fifty years ago. As the Supreme Court noted in that case,

the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

Id. at 507. Consistent with this standard, the scope of discovery under the Commission's rules extends to any information "which appears reasonably calculated to lead to the discovery of admissible evidence." Rules 25 and 26, 39 C.F.R. §§ 3001.25(a) and 3001.26. ANM's discovery requests amply satisfy this standard.

The Postal Service can hardly challenge the relevance of discovery requests that essentially restate Rules 31(k) and 54(o). Those rules were adopted after notice and opportunity for comment by all interested parties, including the Postal Service, and have been in effect for years. The Commission's adoption of Rules 31 and 54 reflects a well-founded judgment that the information covered by the rules is likely to be of great value in rate cases. The Postal Service did not seek leave at the outset of this case to be exempted from these requirements.

Furthermore, the interrogatories are limited to the library references which the Service has sponsored into evidence, or expects to sponsor into evidence. If the Postal Service expects the Commission to place any reliance on these library references, it can hardly dispute the relevance of questions designed to ferret out the data and assumptions underlying them.

Finally, the Postal Service has failed to offer any legitimate objection to ANM's requests for information on the chain of authorization, authorship, consultation, completion, approval and receipt of certain Postal Service studies (*see* ANM/USPS-4 and -8). The questions are limited to studies that the Postal Service is sponsoring into evidence. The requested information is calculated to provide a basis for follow-up interrogatories or cross-examination calculated to establish bias or predisposition by the persons overseeing the study, or test the competence of the witness to sponsor the study. These requests are utterly conventional, and routinely propounded in analogous cases before other tribunals.

The Postal Service's unwillingness to answer these questions betrays how far out of step it has become with mainstream norms of discovery in major litigation.¹

(2) The notion that ANM must identify "defects in the documentation provided by the Postal Service in this case" before seeking discovery of that documentation (Objection at 2) has it completely backwards. Disclosure and discovery of the Postal Service's case come first—*then* the defects get identified. Nothing in the Commission's rules, or the cognate Federal Rules of Civil Procedure, support such a contention that the Commission and other parties must parse the Postal Service's case identify defects and then formulate specific questions. The Service provides no authority for a rule limiting discovery to defects already unearthed by the discovering party, because there is none. Moreover, such a rule would be nonsensical on its face.² As the proponent of change, the Postal Service bears the burden of proving its case. It should not be allowed to fob off that burden on other parties by insisting that they ask only narrow and specific questions about the Postal Service's case.

¹ Exhibit 1 to this Motion reproduces a number of similar questions that appear in standard discovery formbooks. Questions of this kind are also routinely asked in public utility rate litigation involving other industries. It also provides examples of much broader, yet permissible, questions about expert testimony routinely asked in litigation to demonstrate that the ANM has not even approached the limits of proper inquiry in discovery but has restricted its request to certain core information about testimony already offered by the Postal Service.

² In any event, the Motion for Stay filed on October 16, the Motion to Strike filed by Nashua Photo *et al.* on the same date, and the pleadings previously filed by OCA have collectively identified numerous gaps in the Postal Service's documentation of its case.

(3) The Postal Service's claim that the interrogatories seek "broad categories of information that are not "pertinent to each of the unspecified library references" (Objections at 2-3) is wholly unfounded. The interrogatories are specifically limited to the library references that the Postal Service "has sponsored into evidence, or expects to sponsor into evidence." The interrogatories are carefully targeted to a particular types of information (e.g., "special studies," "statistical studies," "computer analyses," "computer simulation models"). If a library reference does not contain the particular compilation of information specified by the question, then no answer is called for. And, as noted above, the interrogatories generally seek the same information which Rules 31 and 54 direct the Postal Service to produce as a matter of course, or information that is routinely discovered in litigation before other tribunals.

(4) If the information requested by a particular question has "already been provided" (Objections at 2), then a citation to the information is fully responsive. In fact, however, most of the information sought has *not* been provided.

(5) The Postal Service's claim of undue burden is also without merit. It is undoubtedly true that producing the data specified by Rules 31 and 54 is a considerable burden for a rate request as complex as the Postal Service's current request. But the Commission's rules properly place that burden on the Postal Service.

The studies and analyses that are the target of ANM's discovery requests were prepared by the Postal Service, not ANM. According to the Postal Service's witnesses, these studies and analyses were prepared by the witnesses or under their supervision. The Postal Service controlled the timing of its rate request, and had

months (for many studies, years) to organize and index its supporting documentation—and collect the information required by the Commission's rules. Interveners cannot possibly share the Postal Service's familiarity with its own case.

Answering ANM's interrogatories may very well require 20 days if, as ANM suspects, the Postal Service has failed to develop the information required by Rule 31 and Rule 54 for the library references at issue. The ANM does not begrudge the Postal Service the time reasonably needed to respond. However, ANM would expect a stay in the proceedings while the Postal Service is preparing its response. The time must be assessed against the Postal Service; otherwise, it would effectively gain a significant advantage from flouting the rules and submitting an incomplete case and then, three months into the case, submitting a mountain of additional testimony while insisting that the other parties and the Commission adhere to the ten month time limit on rate proceedings.

RESPONSES TO OBJECTIONS TO SPECIFIC QUESTIONS

Having objected to the ANM's interrogatories wholesale, the USPS then restates its objections retail in response to each ANM question.

ANM/USPS-1: The issue of the Postal Service's compliance with the rules, especially for library references belatedly sponsored into evidence, is an issue—indeed, the central issue—in this case. Few, if any, matters could be more relevant and more likely to lead to admissible evidence than questions about the methods used to collect and summarize the data the Postal Service is relying upon to support its request. The Service has no right to block discovery by unilaterally

asserting that identification of the collectors of the data upon which its case relies is unneeded. The Postal Service may *think* that its data are above reproach; but thinking does not make it so.

ANM/USPS-2: The Postal Service's claim that this interrogatory requests information on "allocation factors" even when a library reference contains no such item (Objections at 5) is without merit. The request applies only to library references that include allocation factors.

The Postal Services claim that "allocation factors" is undefined is frivolous. The term is taken directly from Rule 54(o)(2) (iii) of the Postal Service's rules of practice. The Postal Service professed no difficulty in understanding the term "allocation factors" when certifying that it had complied with Rules 31 and 54 generally at the outset of this case. Rule 54(o)(2) (iii) of the Commission's Rules of Practice and Procedure. By contrast, since ANM does not know how the data were summarized, it cannot specify the types of summarizations sought. The answer is: whatever summarization were done. The Postal Service prepared these studies, they know what data was used and how it was summarized if it was summarized.

ANM/USPS-3: ANM adopts its answers to the previous question. The term "expansion ratios" appears in Rule 54(o)(2)(iv) of the Commission's rules, 39 C.F.R. § 3001.54(o)(2)(iv). Moreover, the question calls for expansion ratios only where expansion ratios were used. The Postal Service prepared these studies. It or the people who prepared them, if not counsel, should know if expansion ratios were used.

ANM/USPS-4: Once again, the Postal Service's objection attacks a straw man. This question concerns only those library references that (1) have been offered into evidence, and (2) incorporate a special study used to modify, expand, project or audit routinely collected data. Information as to when, where, how and by whom who routinely collected data relied upon as evidence by the Postal Service was modified, expanded, projected, or audited is clearly related to testimony that includes or relies upon that data. *See Rule 54(o)(2)(v).* If the data can be used as evidence by the Postal Service, information about its manipulation is clearly discoverable. If it has been provided, the Postal Service need only identify its where ANM may find it. At some point, either initially or when requested, information about studies used to modify, expand, project or audit routinely collect data, must be proper. If that was not when the testimony was file and is not now, when is it?

ANM/USPS-5: The Commission's rules, specifically Rule 31(k), 39 C.F.R. § 3001.31(k), require the Postal Service to provide the information sought when a library reference involves, includes or relies upon statistical studies, computer analyses models, or other studies or analyses. However, even if the Commission did not have a rule like Rule 31(k), the question would be proper.

The Postal Service created the library references in question and has now offered them in evidence, albeit belated. Which library references now offered in evidence involve, include, or rely upon various statistical studies, computer analysis, and computer simulation models is information uniquely in the hands of the Postal Service which prepared the library references now submitted as testimony. Knowing what statistical studies, computer analyses and computer

simulation models were used, much less alternatives that might have produced different conclusions is clearly appropriate and may well lead to admissible evidence from the Postal Service's own witnesses when asked about these alternatives

ANM/USPS-6: If the testimony of a witness involves, includes, or relies upon a study, then the study plan for that study is clearly relevant. What was the purpose of the study, how was it designed was what it intended to study or prove? What assumptions were made? The Postal Service's objection simply reflects its assumption that its data are so inherently objective and reliable, that any questions concerning them are improper. The tobacco industry asserted for years that its data were objective and reliable. We now know that that was not so.

ANM/USPS-7: These objections have been addressed above in the response to the Postal Service's objection to ANM/USPS-6.

ANM/USPS-8: This interrogatory requests information concerning who proposed particular studies and analyses, when they were done, who approved them, who conducted them, who prepared and submitted the results, when the studies or analyses were completed, when the results were reported, and to whom they were reported. These question are as routine and mundane as any questions utilized in modern discovery. If a study or analysis is offered in evidence, opposing parties are entitled to know who proposed the study, who approved it, who prepared, who submitted the results, when and to whom results were reported, and who received any interim or preliminary results and when. All of this information is relevant to understanding the study as is whether they were

undertaken to prove a specific point, what alternatives were considered, and whether any changes were made as a result of anyone's review of the results.

ANM/USPS-9: This Interrogatory asks for forms used to collect, record, summarize or report data or results. Often such forms reveal clearly various assumptions simply by what information is collected and what is not. Reviewing these forms often reveal if the data can be used for the purposes for which it has been used. In this case serious questions have arisen regarding how IOCS tallies are made and whether the information reported is adequate to support the conclusions drawn from the data.

ANM/USPS-10: The objections to this question have been addressed in responses to the previous objections.

ANM/USPS-11: The assertion that information about alternative courses of action is not calculated to lead to admissible evidence is absurd. The fact that a study other than the study that was done could have been undertaken and might have provided different answers is clearly relevant and admissible. The Postal Service's objection to this and most of the other questions simply reflects its assumption that its data cannot be questioned but must be taken to prove what it says it proves. No other data are admissible nor is evidence of bias or error admissible.

If evidence of bias is not admissible, why do the Commission's rules require the Postal Service to provide information on alternative courses of action that were considered? Can one, imagine trying an automobile negligence case without being allowed to ask the other side's expert if he or she had considered any alternative to the study(ies) he or she conducted? Or how about a medical malpractice case?

Would a questions to a defendant doctor alleged to have mis-diagnosed a case as to whether he or she had considered any alternative diagnosis or tests be improper on the grounds it would not lead to admissible evidence? What evidence does the Postal Service believe is proper? Only its own, it would appear.

ANM/USPS-12: Rule 31(k)(2) sets out, in detail, the information about statistical studies that a proponent must provide. This questions asks for some of that information and that is all.

ANM should not even have to ask this information or most of information it has sought by the interrogatories the Postal Service has objected to. The answer to this question and most of its others should have been submitted by the Postal Service with the formal request last July. The existence of Rule 31(k)(2), like the existence of the other rules upon which most of the questions the Postal Service has objected to are based, should be establish the appropriateness of the question and the admissibility of the responses. Clearly the data collection procedures are relevant to the accuracy and reliability of the data and what the data proves, if anything. Does the Postal Service really believe that it should not have to provide the formulas used for statistical estimates or the standard errors or each component of study relied upon by its own witness? If this information is not provided, any study that uses the study should be stricken. The other objections of the Postal Service simply repeat the standard mantra it has adopted with respect to the interrogatories at issue.

ANM-USPS-13: The question posed is intended to elicit information regarding the reliability of sample surveys. The answers could demonstrate that the studies to which they apply, those that involve sample surveys, may not be

admissible. How much more obvious can the relevance of this statement?

ANM/USPS-14: This question simply asks the Postal Service to provide information about econometric studies used in testimony submitted by Postal Service witnesses. This information is required by Rule 31(k)(2)(iii) of the Commission's rules. As before, the very existence of the rule should render the request proper. If this information is not available, the econometric study and the testimony which uses it should be stricken. If particular studies are in the Postal Service's view too tenuous to warrant a response, we have no objection and agree it need not respond *provided* that the tenuously connected study or studies identified and *all testimony that utilizes them are stricken.*

In objecting to the ANM's interrogatories, the Postal Service has simply ignored the fact that the questions ask for information about testimony the Postal Service has itself offered in evidence. A description of the programs used, the processing tasks performed, the methods and procedures employed, the input and output data and the designation of the sources of data used in a computer analysis that is offered in evidence or that is relied upon to support testimony are admissible to impeach or challenge the weight that study or the analysis should be given.

ANM/USPS-15 The response to the Postal Service's objection to ANM/USPS-14 is equally applicable to this objection. Instead of econometric studies, this question asks about computer analyses. Instead of being required by Rule 31(k)(2)(iii), the information sought by this question is required by Rule 31(k)(3) of the Commission's Rules. The question asks for information about testimony already or to be offered by the Postal Service. As before, the very

existence of the rule should render the request proper. If this information is not available, the econometric study and the testimony which uses it should be stricken. As before, if all or some of the computer analyses inquired about are in the Postal Service's view to tenuous to warrant a response, we have no objection and agree it need not respond *provided* that the tenuously connected analyses and *all testimony that utilizes them are stricken.*

ANM/USPS-16: The ANM's response to the Postal Service's objections to ANM/USPS-14 and ANM/USPS-15 are equally applicable to this objection. Instead of econometric studies and computer analyses, this questions asks about computer simulation models. The information sought by this question is required by Rule 31(k)(3)(j) of the Commission's Rules. The question ask for information about testimony already or to be offered by the Postal Service. As before, the very existence of the rule should render the request proper. If this information is not available, the computer simulation models and all testimony which uses or relies upon any such model should be stricken. The information sought relates directly to testimony of the Postal Service witnesses, and may lead to admissible information concerning such testimony. The ANM acknowledges that it may take the Postal Service some time to respond. However, the Postal Service will need far less time to respond than it would take the ANM which did not prepare the testimony utilizing these simulation models not prepare or conduct the simulations. The fact that the models are available in some form to the ANM is immaterial. Ferreting out the information sought from computer simulations it did not create or utilize is far more difficult for the ANM than for the Postal Service.

If the Postal Service requires more than seven days to respond, then ANM will join with it in a request that the proceeding be stay while the response is

developed. The Postal Service knew the rules when it decided to file its formal request in this case. If it need more time to prepare it case then it should have taken it. It cannot now, having ignored the rules, turn the tables on the other parties by demanding that they find their own way through the Postal Service's maze before they can even pose questions about testimony prepared by the Postal Service. Had the Postal Service collected this information when it put it case together as it could have, the burden and delay it now complains of could have been avoided or substantially reduced.

The ANM would, of course, be pleased to work with the Postal Service to craft a protective order that will prevent the inappropriate disclosure of any commercially sensitive, trade secret or other privileged or confidential information needed to respond to its interrogatories.

Respectfully submitted,



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November 14, 1997

Exhibit 1

Bender's Forms of Discovery includes the following questions regarding reports:

13. State whether any expert has ever submitted a report setting for his or her opinions or conclusions reached from any test, analysis, examination or inspection that he or she may have conducted, and, if so, set forth in detail:

- a. The name of each such expert;
- b. the date the first draft of the report was prepared;
- c. the date the last draft of the report was submitted;
- d. the name and address of each person to whom it was submitted;
- e. the name and address of each person who has present custody of the report; and
- f. a summary of contents of the report.

14. State whether any expert has ever submitted any other reports with regard to any issues relevant to this lawsuit, and if so, set forth in detail:

- a. the name of each such expert;
- b. the date the first draft of the report was prepared;
- c. the date the last draft of the report was submitted;
- d. the name and address of each person to whom it was submitted;
- e. the name and address of each person who has present custody of this report;
- f. a description of each report that was made; and
- g. a summary of contents of the report.

See Questions 13 and 14 in 3A Bender's Forms of Discovery at A7 378.32 (1997).

Bender's Forms also provides a number of routine questions that ANM did *not* pose. ANM did not ask for "graduate school transcripts" of each of the Postal Service's experts. *See* question 3, Int. 9, at A7 378.22, *Bender's Forms of Discovery*, Vol. 3A, 1997.

ANM did not ask whether any of the Postal Service's experts "have ever been disciplined in any way by a regulatory body or court", and, if so, to "describe in detail all discipline and identify and attach all documents relating to such discipline." *See*, question 7, Int. 9, at A7 378.22, *Bender's Forms of Discovery*, Vol. 3A, 1997.

ANM did not ask the Postal Service to provide "the date of the initial and all subsequent contacts between it and its experts," nor did ANM ask it to identify much less provide copies of "all material, of whatever nature, submitted to the each expert," nor did ANM ask the Postal Service to "identify and provide copies of all correspondence and communications it received from its experts." *See*, question 9, Int. 9, at A7 378.23, *Bender's Forms of Discovery*, Vol. 3A, 1997. All ANM asked about were interim, preliminary or final reports.

ANM did not ask the Postal Service to "describe in detail all information and documents reviewed by each expert in reaching his opinion." *See*, question 11.c., Int. 9, at A7 378.22, *Bender's Forms of Discovery*, Vol. 3A, 1997. All we have done is ask the Postal Service to identify the source of data actually used by its witnesses.

ANM did not ask the number of times Postal Service counsel "communicated with each expert." *See*, question 13, Int. 9, at A7 378.24, *Bender's Forms of Discovery*, Vol. 3A, 1997.

ANM did not ask the Postal Service to provide (a) the name or title of any writing, consulted, reviewed or referred to by each of its experts in preparing his or her testimony or in reaching each conclusion included in his or her testimony" much less "to name of the author of each such writing, the date of publication of the writing and the name and address of the publisher or, in the case of a journal, the name, issue number and date of the writing." *See*, question 14, Int. 9, at A7 378.24, *Bender's Forms of Discovery*, Vol. 3A, 1997.

ANM did not ask the Postal Service to identify all published authorities which each of its experts recognizes in the area of their respective expertise. *See*,

question 16, Int. 9, at A7 378.25, Bender's Forms of Discovery, Vol. 3A, 1997.

With respect to each of its witnesses, ANM did not ask the Postal Service to state whether he or she had testified or participated in other litigation and:

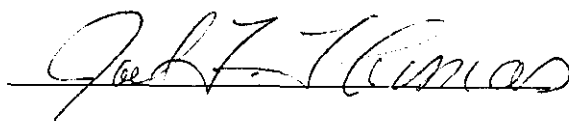
- a. the number of time the witness has testified under oath.
- b. the dates and fora in which each testified,
- c. the number of times each has been deposed,
- d. the number of times and the fora in which each witness has otherwise participated in litigation,
- e. whether there are transcripts of any such prior testimony,
- f. the date and caption of each such transcript, and
- g. the present location of each such transcript where it may be examined by counsel.

See questions 17 and 18, Int. 9, at A7 378.25, Bender's Forms of Discovery, Vol. 3A, 1997.

Finally, ANM did not ask the Postal Service to identify experts with whom it consulted but who it has not called as a witness in this case nor why they were not called. See, question 20, Int. 9, at A7 378.26, Bender's Forms of Discovery, Vol. 3A, 1997.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

A handwritten signature in cursive script, reading "Joe L. Thomas", is written over a horizontal line.

November 14, 1997